Francis a/l Anthonysamy v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO C-05-87 OF 1996
MOKHTAR SIDIN, ALAUDDIN AND ABDUL AZIZ JJCA
23 JANUARY 2003

Criminal Procedure *— Defence — Diminished responsibility — Intoxication — Standard of proof on appellant as to drunkenness — Balance of probabilities — Trial judge did not find it probable that appellant's state of mind was at all impaired by intoxication — Whether trial judge bore in mind that standard of proof on appellant as to drunkenness was on a balance of probabilities*

Criminal Procedure *— Statements — Admissibility — Cautioned statement — Whether recording officer and interpreter to state in evidence actual words used in giving caution — Whether to assume that caution given was in prescribed words — Criminal Procedure Code s 113(a)(ii)*

Criminal Procedure *— Statements — Admissibility — Self-incrimination — Statements made by appellant voluntary — Whether voluntary statements were inadmissible if they were made before their maker had been given a caution against self-incrimination — Criminal Procedure Code s 112(4)*

Criminal Procedure *— Statements — Admissibility — Voluntariness — Recording officer asked appellant whether he was promised, compelled, threatened to make the statement — Failure by recording officer to ask appellant whether he was induced to make statement — Whether failure to ask appellant whether he was induced to make a statement was a ground for disqualifying cautioned statement — Whether recording officer had to be satisfied that statement was being made voluntarily before recording it — Whether question of voluntariness to be decided by court only*

The appellant was charged at the High Court at Temerloh for the murder of one Ali Ahammed bin Mohammed Ullah, a Bangladesh national ('the deceased'). The headless body of the deceased was found by an estate worker on 23 August 1994. The principal witness for the prosecution was one Meganathan a/l Mariapen ('SP4'). SP4 testified that on 19 August 1994, the deceased sought and got a lift from the appellant and SP4, who were travelling in a motorcar. The appellant bought a bottle of samsu and two cans of beer, which the appellant and the deceased drank. On the way to Charuk Puting, the appellant asked SP4 to drive deep into the oil palm estate, saying that he wanted to finish his drink and wanted to avoid their being caught drinking by the police. When the car stopped, the appellant and the deceased continued to drink at the rear of the car. SP4, who was at the front of the car heard someone being hit and went to the rear of the car to look. SP4 saw the appellant hitting the deceased on the head with a rattan cane. The appellant, carrying a parang with him, then dragged the deceased away. After a while the appellant returned and asked SP4 to drive him to a temple to get another parang. They drove

to the temple, where the appellant obtained a parang and returned to the place where the deceased's body had been left. The appellant asked SP4 to remain in the car and went to the deceased's body. SP4 then heard the sound of hacking. Soon after, the appellant returned to the car carrying a bundle together with the parang, the rattan cane and the deceased's shirt and trousers. They then resumed their journey back to Charuk Puting. On the way there, the appellant threw the parang, rattan cane, shirt and trousers into a swamp by the side of the road and concealed the bundle, which was in a black plastic container under some oil palm fronds some distance away. Late in the afternoon of the next day, the appellant told SP4 that he had buried the deceased's head. The appellant was arrested on 26 August 1994. When interrogated by the investigation officer, the appellant said that he had buried the deceased's head at the Charuk Puting oil palm estate. At the trial, the appellant's counsel did not object to the admission of the written record of that statement. That same night, after the interrogation, the appellant and SP4, who was also in police custody, led the police to a spot where the appellant said he had thrown the parang, the rattan cane and the deceased's trousers. Those items were found at that location. The appellant and SP4 then led the police party to a spot where the appellant said he had buried the deceased's head. A man's head wrapped in a shirt was found buried in the ground. Those three statements that the appellant made at the scene were recorded by the police. The appellant's counsel did not object to the admission of the appellant's statements and they were accordingly admitted. On 27 August 1994, the appellant and SP4 led a police party to a location where the appellant had thrown the parang and a parang was found there. The police also recorded the appellant's statement in a police report, the admission of which the appellant's counsel had no objection to. On 30 August 1994, the appellant gave a confessionary cautioned statement which in essential particulars was consistent with SP4's evidence. The appellant also confessed in the statement that the purpose of the killing was to obtain a human skull to bring to a bomoh in order to win a four digit lottery. It was submitted at the end of the trial that the appellant's state was due to intoxication and that he had no intention to cause death. Therefore, the appellant's counsel argued that the appellant could only be found guilty on a reduced charge of culpable homicide not amounting to murder. The trial judge rejected the defence of drunkenness and convicted the appellant for the murder of the deceased and sentenced him to death. This was the appellant's appeal against the conviction.

Held, dismissing the appeal:

(1) According to the evidence, the caution prescribed by s 113(a)(ii) of the Criminal Procedure Code ('the CPC') was administered.

A The words actually used in giving the caution were set out at the beginning of the statement form. There was no need for the recording officer and the interpreter to state in evidence the actual words used. It must be accepted that the caution given was in the prescribed words unless there was any indication or proof to the contrary (see p 58H–I).

B

(2) The recording officer had asked the appellant whether he was promised, compelled, threatened to make the statement, to which the reply was no. The failure of the recording officer to ask the appellant whether he was induced was not itself a ground for disqualifying the cautioned statement because there was nothing C in s 113 of the CPC that called for a recording officer to be satisfied that a statement was being made voluntarily before recording it. The question of voluntariness was to be decided by the court and in the instant case, the trial judge found that there was no inducement (see p 59A, D–F); *Juraimi bin Husin v Public* D *Prosecutor* [1998] 1 MLJ 537 followed.

(3) The trial judge recognized that the burden on the prosecution was to prove voluntariness beyond reasonable doubt, and that the prosecution would have failed to discharge the burden if the accused could show on a balance of probabilities that he was E assaulted. The trial judge clearly recognized that the burden on the prosecution was one of proof beyond reasonable doubt (see pp 59I–60A, C).

(4) As far as self-incrimination was concerned, s 112(4) of the CPC required a police officer examining a person under s 112(1) of the F CPC to first inform him that he 'may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture'. Since the appellant's counsel did not contend that the statements made by the appellant on 26 and 27 August 1994 were not voluntary, he must have meant to say, on the authority of *Goi Ching Ang v Public* G *Prosecutor* [1999] 1 MLJ 507, that even though those statements were voluntary, they were inadmissible if they were made before its maker had been given a caution against self-incrimination. Since the question that arose in *Goi Ching Ang* was one of voluntariness and not of self-incrimination, the court was hesitant H to accept *Goi Ching Ang* as laying down the principle that for s 27 of the Evidence Act 1950 information to be admissible, it must be given after he had been cautioned against self-incrimination. In any case, the question of whether a warning against self-incrimination was given to the appellant at any time before he gave the information never arose in the instant case because the I admission of the information was not objected to by the appellant's counsel (see p 61C–G); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 distinguished.

(5) The trial judge bore in mind that the standard of proof on the appellant as to drunkenness was one of balance of probabilities but that, after considering the appellant's conduct as proved by the prosecution, the trial judge did not find it probable that the state of mind of the appellant was at all impaired or affected by intoxication. In mentioning the absence of scientific evidence, what the trial judge meant was that looking at the evidence available as a whole it was not probable that the appellant was unconscious or had no intention to cause the death of the deceased and that if ever what was so obvious from the available evidential material was to be disturbed, it could be disturbed only by some scientific evidence (see p 63E–G).

(6) The evidence in its entirety clearly showed that the appellant had killed the deceased deliberately for the purpose of obtaining a human skull that he believed was needed in order to win a four digit lottery (see pp 63I–64A).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi Temerloh kerana membunuh seorang bernama Ali Ahammed bin Mohammed Ullah, seorang warga Bangladesh ('si mati'). Mayat tidak berkepala si mati telah ditemui oleh seorang pekerja estet pada 23 Ogos 1994. Saksi utama bagi pihak pendakwaan adalah seorang bernama Meganathan a/l Mariapen ('SP4'). SP4 telah memberikan keterangan bahawa pada 19 Ogos 1994, si mati telah meminta dan dapat menumpang perayu dan SP4, yang sedang memandu kereta. Perayu telah membeli sebotol samsu dan dua tin arak, yang mana perayu dan si mati telah minum. Dalam perjalanan ke Charuk Puting, perayu telah meminta SP4 memandu ke dalam estet minyak kelapa sawit, dengan mengatakan bahawa beliau hendak menghabiskan minumannya dan ingin mengelakkan daripada ditangkap kerana minum arak oleh pihak polis. Apabila kereta berhenti, perayu dan si mati terus minum di belakang kereta. SP4, yang berada di depan kereta telah mendengar seorang dipukul dan pergi ke belakang kereta untuk melihat. SP4 melihat perayu memukul si mati di kepala dengan rotan. Perayu, yang membawa sebilah parang bersama beliau, kemudian menarik si mati dari situ. Sejenak kemudian perayu telah kembali dan meminta SP4 untuk membawa beliau ke sebuah kuil untuk mendapat parang yang lain. Mereka memandu ke kuil tersebut, di mana perayu telah mendapat sebilah parang dan kembali ke tempat di mana mayat si mati ditinggalkan. Perayu meminta SP4 duduk di dalam kereta dan telah pergi ke mayat si mati. SP4 kemudian mendengar bunyi tetakan. Sejurus kemudian, perayu kembali ke kereta dengan membawa satu bungkusan bersama dengan parang, rotan dan baju dan seluar si mati. Mereka kemudian meneruskan perjalanan mereka ke Charuk Puting. Dalam perjalanan ke sana, perayu telah membuang parang, rotan, baju dan seluar tersebut ke dalam paya di tepi jalan dan

menyembunyikan bungkusan tersebut, yang berada di dalam bekas plastik berwarna hitam di bawah pelepah-pelepah kelapa sawit tidak jauh dari situ. Pada lewat petang keesokan harinya, perayu telah memberitahu SP4 bahawa beliau telah menanam kepala si mati. Perayu telah ditangkap pada 26 Ogos 1994. Semasa disoal siasat oleh pegawai penyiasat, perayu berkata bahawa beliau telah menanam kepala si mati di estet kelapa sawit Charuk Puting. Semasa perbicaraan, peguam perayu tidak membantah terhadap penerimaan rekod bertulis pernyataan tersebut. Pada malam yang sama, selepas soal siasat tersebut, perayu dan SP4, yang berada di dalam tahanan polis, telah membawa pihak polis ke tempat di mana perayu katakan beliau telah membuang parang, rotan dan seluar si mati. Barang-barang tersebut ditemui di lokasi itu. Perayu dan SP4 kemudian membawa pihak polis ke tempat di mana perayu katakan beliau menanam kepala si mati. Kepala seorang lelaki yang dibungkus dengan sehelai baju ditemui ditanam dalam tanah. Ketiga-tiga pernyataan yang dibuat oleh perayu di tempat kejadian telah direkodkan oleh pihak polis. Peguam perayu tidak membantah terhadap penerimaan pernyataan-pernyataan perayu dan pernyataan-pernyataan tersebut telah diterima sewajarnya. Pada 27 Ogos 1994, perayu dan SP4 telah membawa pihak polis ke suatu tempat di mana perayu telah membuang parang dan sebilah parang telah ditemui. Pihak polis juga telah merekodkan pernyataan perayu dalam satu laporan polis, penerimaan tersebut yang mana peguam perayu tidak membantah. Pada 30 Ogos 1994, perayu telah memberikan satu pernyataan pengakuan beramaran di mana butir-butir penting adalah konsisten dengan keterangan SP4. Perayu juga mengaku dalam pernyataan tersebut bahawa tujuan pembunuhan tersebut adalah untuk mendapatkan tengkorak manusia untuk diberikan kepada seorang bomoh bagi tujuan memenangi loteri empat digit. Ia dihujahkan di penutup perbicaraan bahawa keadaan perayu adalah disebabkan oleh keadaan mabuk dan bahawa beliau tidak berniat untuk menyebabkan kematian. Oleh itu, peguam perayu menghujahkan bahawa perayu hanya boleh didapati bersalah atas satu pertuduhan yang diringankan kepada homisid bersalah yang tidak bermaksud untuk membunuh. Hakim perbicaraan menolak pembelaan disebabkan sifat pemabuk dan menyabitkan perayu kerana membunuh si mati dan menjatuhkan hukuman mati ke atas beliau. Ini adalah rayuan perayu terhadap sabitan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Menurut keterangan, amaran yang ditetapkan oleh s 113(a)(ii) Kanun Acara Jenayah ('KAJ') telah dimaklumkan. Perkataan-perkataan yang sebenarnya digunakan dalam memberikan amaran tersebut telah dinyatakan di permulaan borang pernyataan tersebut. Tiada keperluan untuk pegawai perakam dan jurubahasa menyatakan dalam keterangan perkataan-

perkataan sebenar yang digunakan. Ia mesti diterima bahawa amaran yang diberikan adalah dalam perkataan-perkataan yang ditetapkan kecuali jika terdapat apa-apa tanda atau bukti yang bertentangan (lihat ms 58H–I). A

(2) Pegawai perakam telah bertanya kepada perayu sama ada beliau telah dijanji, didesak, diugut untuk membuat pernyataan tersebut, yang mana jawapannya adalah tidak. Kegagalan pegawai perakam untuk menanyakan perayu sama ada beliau telah dipujuk bukan sendirinya satu alasan untuk tidak melayakkan pernyataan beramaran kerana tiada apa-apa dalam s 113 KAJ yang memerlukan seorang pegawai perakam berpuas hati bahawa satu pernyataan telah dibuat secara sukarela sebelum merekodkannya. Persoalan kesukarelaan hendaklah diputuskan oleh mahkamah dan dalam kes semasa, hakim perbicaran mendapati bahawa tiada pendorongan telah berlaku (lihat ms 59A, D–F); *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537 diikut. B C

(3) Hakim perbicaraan menyedari bahawa beban atas pihak pendakwaan adalah untuk membuktikan kesukarelaan melampaui keraguan munasabah, dan bahawa pihak pendakwaan akan gagal untuk melepaskan beban tersebut jika tertuduh dapat menunjukkan pada satu imbangan kebarangkalian bahawa beliau telah dipukul. Hakim perbicaraan dengan jelas menyedari bahawa beban atas pihak pendakwaan adalah suatu bukti melampaui keraguan munasabah (lihat ms 59I–60A, C). D E

(4) Sejauhmana ia adalah mengenai mempersalahkan diri sendiri, s 112(4) KAJ menghendaki seorang pegawai polis yang memeriksa seseorang di bawah s 112(1) KAJ untuk memberitahu beliau terlebih dahulu bahawa beliau 'may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture'. Memandangkan peguam perayu tidak menegaskan bahawa pernyataan-pernyataan yang dibuat oleh perayu pada 26 dan 27 Ogos 1994 adalah secara tidak sukarela, beliau mungkin bermaksud untuk mengatakan, berdasarkan autoriti *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, bahawa walaupun pernyataan-pernyataan tersebut adalah secara sukarela, pernyataan-pernyataan tersebut tidak boleh diterima jika pernyataan-pernyataan tersebut dibuat sebelum pembuatnya diberikan satu amaran terhadap mempersalahkan diri sendiri. Memandangkan persoalan yang timbul dalam *Goi Ching Ang* adalah tentang kesukarelaan dan bukan tentang mempersalahkan diri sendiri, mahkamah ini berasa berat untuk menerima *Goi Ching Ang* yang telah membentangkan prinsip di mana untuk satu maklumat di bawah s 27 Akta Keterangan 1950 diterima, ia mestilah diberikan selepas beliau telah diberi amaran terhadap mempersalahkan diri sendiri. Dalam apa keadaan pun, persoalan sama ada satu amaran terhadap mempersalahkan diri sendiri telah diberikan kepada perayu pada bila-bila masa sebelum beliau memberikan maklumat tersebut F G H I

A tidak pernah timbul dalam kes semasa kerana penerimaan maklumat tersebut tidak dibantah oleh peguam perayu (lihat ms 61C–G); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 diikut.

(5) Hakim perbicaraan telah mengambil perhatian bahawa piawai pembuktian atas perayu sebagai seorang bersifat pemabuk adalah B pada suatu imbangan kebarangkalian tetapi, setelah menimbangkan perbuatan perayu sebagaimana yang dibuktikan oleh pihak pendakwaan, hakim perbicaraan tidak mendapati yang ia mungkin bahawa keadaan minda perayu menjadi lemah atau terjejas oleh sebab mabuk. Dalam menyebutkan tentang C ketiadaan keterangan saintifik, apa yang hakim perbicaraan memaksudkan adalah melihat keseluruhan keterangan yang ada, ia tidak mungkin bahawa perayu tidak sedar atau tidak mempunyai niat untuk menyebabkan kematian si mati dan bahawa jika apa yang amat nyata daripada keterangan yang ada akan diganggu, ia hanya boleh diganggu oleh keterangan saintifik D (lihat ms 63E–G).

(6) Keterangan secara keseluruhan jelas menunjukkan bahawa perayu telah membunuh si mati dengan sengaja bagi tujuan mendapat tengkorak manusia yang beliau percaya diperlukan untuk memenangi loteri empat digit (lihat ms 63I–64A).]

E

Notes

For cases on admissibility of statements, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3643–3649.

For cases on diminished responsibility, see 5 *Mallal's Digest* (4th Ed, F 2001 Reissue) para 1461.

Cases referred to

Goi Ching Ang v PP [1999] 1 MLJ 507 (distd)

Juraimi bin Husin v Public Prosecutor, Mohd Affandi bin Abdul Rahman G *& Anor v Public Prosecutor* [1998] 1 MLJ 537 (folld)

Md Desa bin Hashim v Public Prosecutor [1995] 3 MLJ 350

Legislation referred to

H Criminal Procedure Code ss 112, (1), proviso to sub-s (2), (4), 113, proviso (a) to sub-s 1

Evidence Act 1950 s 27

Penal Code s 86(2)

Appeal from: Criminal Trial No 45–3–1995 (High Court, I Temerloh)

Karpal Singh (*Jagdeep S Deo* with him) (*Karpal Singh & Company*) for the appellant.

Anselm Charles Fernandis (Deputy Public Prosecutor) for the respondents. A

Abdul Aziz JCA (delivering judgment of the court): The finding on 23 August 1994 in the Kim Swee Leong oil palm estate in Mentakab by an estate worker of the headless body of Ali Ahammed bin Mohammed Ullah, a Bangladesh national, led to police investigations that resulted in the prosecution and conviction, on 31 October 1996, by the High Court at Temerloh, of the appellant for the murder of the said Ali Ahammed. The appellant was sentenced to death. On 18 September 2002, we dismissed his appeal. B

The principal witness for the prosecution, and the only eye witness to the events leading to Ali Ahammed's death, was one Meganathan a/l Mariapen ('SP4'). His evidence, as set out in the trial judge's grounds of decision, was essentially as follows. C

On the date of the murder, which was 19 August 1994, the appellant was staying with Meganathan and his family in Ladang Kurnia Setia, Charuk Puting, Temerloh. The appellant and Meganathan were workers of the Ladang Kurnia Setia, as also was the deceased, who was known to them both. D

Three or four weeks before that date, in a discussion as to how to win a four digit lottery, the appellant had told Meganathan that what it needed was a human skull and the help of a bomoh. E

On the evening of that day, when the appellant and Meganathan were travelling in a motorcar from their home to go to Kampung Awah, the deceased sought and got a lift from them to Batu 5 Jalan Maran, where, at the deceased's invitation, Meganathan joined him for a drink in a shop. The appellant, who had turned down the invitation, remained in the car. After the drink, the deceased now also wanting to go there, the three proceeded to Kampung Awah, where the appellant bought a bottle of samsu and two cans of beer. On the journey back to Charuk Puting, the appellant and the deceased, who were sitting at the back, helped themselves to the drinks. At the appellant's request, they stopped at his mother's house in Ladang Kim Swee Leong, where only the deceased continued drinking. They left the house of the appellant's mother at about 9pm for Charuk Puting, but on the way the appellant asked Meganathan to stop the car, saying he wanted to finish his drink. The appellant asked Meganathan to drive deep into the oil palm estate, saying that it was to avoid their being caught drinking by some police patrol. At a spot that could not be seen from the main road, the car stopped and they all got down. Meganathan sat on the bonnet eating peanuts, while the appellant and the deceased were drinking at the rear of the car. On hearing the sound of the deceased's voice and of someone being hit, Meganathan went to the rear of the car and saw the appellant hitting the deceased on the head with a rattan cane twice. The deceased fell to the ground and the appellant, carrying a parang with him, dragged him away. After a while the appellant returned saying he had lost the parang and asked Meganathan to drive him to a temple some distance away to get F G H I

A another parang. So they drove to the temple, where the appellant obtained a parang. They then returned to the place where the deceased's body had been left. The appellant went to the deceased's body, asking Meganathan to remain in the car, from where Meganathan heard the sound of hacking. Soon after, the appellant returned to the car carrying a bundle, which he placed in the boot of the car together with the parang, the rattan cane and B the deceased's shirt and trousers. They then resumed their journey back to Charuk Puting, stopping at two more places on the way. One stop was somewhere on Jalan Maran, where the appellant threw the parang, rattan cane, shirt and trousers into a swamp by the side of the road. The next stop was not long after, when the appellant took the bundle, which was in a black C plastic container, to a place among some oil palm trees by the roadside, and concealed the bundle and the plastic container under some oil palm fronds.

Late in the afternoon of the next day, 20 August 1994, Meganathan saw the appellant leaving their house on a motorcycle and returning with a cangkul. The appellant told Meganathan that he had buried the deceased's D head.

That, according to the trial judge's grounds of decision, was the evidence of Meganathan.

The appellant was arrested on 26 August 1994. When interrogated by ASP Mohd Sabri bin Muhamad, the investigation officer, at 10.32pm on E that day, the appellant said, besides other things, 'Tanam kepala Ali di kebun kelapa sawit Charuk Puting'. At the trial the appellant's counsel did not object to the admission of the written record of that statement (P46A: notes, p 111D–E). That same night, after the interrogation, the appellant and Meganathan, who was also in police custody, led ASP Mohd Sabri F and other police officers to a spot at the third kilometer, Jalan Maran-Temerloh, where the appellant told ASP Mohd Sabri, 'Sinilah saya buang itu parang, rotan dan seluar Ali'. A pair of trousers was found hanging from the branch of a dead tree and a rattan cane was found on the ground beneath the branch. The appellant and Meganathan next, at about 11.50pm, led the police party into Ladang Charuk Puting to a spot where G the appellant said to ASP Mohd Sabri, 'Sinilah tempat saya tanam kepala Ali'. A man's head wrapped in a shirt was found buried in the ground. At a little distance from there, the appellant told ASP Mohd Sabri, 'Sinilah tempat buang plastik isi kepala Ali'. A black plastic container was found thereabouts.

H Those three statements that the appellant made at the scene were recorded in a police report made by ASP Mohd Sabri. The appellant's counsel had no objection to their admission and they were admitted as P50A, P50B and P50C: notes, p 112C.

The next day, 27 August, at about 12.15pm, the appellant and Meganathan led Chief Inspector Mohamed Jamal bin Mat Nor and a police I party to a location at the third kilometer Jalan Maran-Temerloh where the appellant said to CI Mohamed Jamal, 'Sinilah saya buang itu parang'. A parang was found there. CI Mohamed Jamal recorded the statement in a

police report (P45), the admission of which the appellant's counsel had no objection to: notes, p 98A–B. A

On 30 August 1994, the appellant gave a confessionary cautioned statement which, in essential particulars, was consistent with what has been set out earlier as the evidence of Meganathan. The appellant also confessed in the statement that the purpose of the killing was to obtain a human skull to bring to a bomoh in order to win a four digit lottery and that on the day in question the opportunity that he had been waiting for had presented itself (meaning undoubtedly in the person of the deceased). B

In his submission before us, Mr Karpal Singh, counsel for the appellant, raised three issues. We will deal first with the issue of the cautioned statement. Section 113 of the Criminal Procedure Code provides for the admissibility in evidence at his trial of statements made in certain circumstances by any person charged with any offence, but proviso (a) to sub-s (1) prohibits the admission or use of any such statement — C

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or D

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect: E

> 'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence' F

Mr Karpal Singh submitted as regards the cautioned statement that there had been non-compliance with s 113 in certain respects and that therefore it should have been rejected.

Mr Karpal Singh referred to p 62B of the notes, where the recording officer, Chief Inspector Md Azmi bin Othman, said that he read out to the appellant the caution prescribed in para (ii) of the said proviso, and to p 68D where the interpreter said that CI Md Azmi read out one by one ('satu per satu') the caution that the interpreter was to, and did, translate. Mr Karpal Singh submitted that the actual words of the caution that was administered should, according to practice, have been read out in evidence, but that was not done in this case. We disagreed. According to the evidence, the caution prescribed by the said para (ii) was administered. The words actually used in giving the caution were set out at the beginning of the statement form and they were the Malay version of the words prescribed in the said para (ii). There was no need for the recording officer and the interpreter to state in evidence the actual words used. It must be accepted that the caution given was in the prescribed words unless there was any indication or proof to the contrary. G H I

A As regards whether the making of the cautioned statement was caused by any inducement, threat or promise of the kind specified in para (i) of the proviso, the recording officer said at p 62B of the notes that he had asked the appellant whether he was 'dijanjikan, dipaksa, diugut' to make the statement, to which the reply was no. Mr Karpal Singh submitted that the appellant was not also asked whether he was 'didorong' (induced) to make B the statement. It was true that 'dijanjikan, dipaksa, diugut' meant promised, compelled, threatened and that 'induced' was absent from the question. Mr Karpal Singh also referred to the evidence of the interpreter at p 71B of the notes that he was not sure whether the recording officer ever asked him to translate the question whether the appellant was going to give his statement voluntarily. We understood this aspect of the submission to be C intended as a criticism of the conduct of the recording officer in the matter of the recording of the cautioned statement, as much as to say that the recording officer, before recording the appellant's statement, failed to ask the right questions to satisfy himself that the appellant was going to give his statement voluntarily. It was not a criticism of the conduct of the trial D judge, who did find at p 92C of the notes that the cautioned statement was given by the appellant 'free from any inducement, threat or promise'. On that view of Mr Karpal Singh's submission, we were of opinion that the failure of the recording officer to ask the appellant about inducement was not itself a ground for disqualifying the cautioned statement because, as the Federal Court (by Gopal Sri Ram JCA) said in *Juraimi bin Husin v Public* E *Prosecutor, Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537 at p 564 and as is apparent from the way the said para (i) is worded, there is nothing in s 113 that calls for a recording officer to be satisfied that a statement was being made voluntarily before recording it and 'the legislature by the terms of the language employed has left the determination of the question of voluntariness to the court and not to the F recording officer'. As stated before, the trial judge found there was no inducement.

Finally, as regards the cautioned statement, Mr Karpal Singh submitted that the trial judge applied the wrong standard of proof, namely that of balance of probabilities, for the voluntariness of the G cautioned statement. The words that came under criticism were those after the first sentence in the following passage in the judgment of the trial judge after the secondary trial to determine the admissibility of the cautioned statement:

> With regards to the accused's assertion that he was assaulted while under H remand, I have this to say while the prosecution is under obligation to prove beyond reasonable doubt that I/D 43 was given by the accused free of any kind of coersion [sic] inducement or promise. The defence in asserting that the accused was assaulted, must come up with some form of evidence to show on the balance of probabilities that what was alleged could have occurred. This, the defence did not do. The assertion remains just a bare allegation.

I

It was clear to us that the judge recognized that the burden on the prosecution was to prove voluntariness beyond reasonable doubt, and that

the prosecution would have failed to discharge the burden if the accused could show on a balance of probabilities that he was assaulted. Balance of probabilities was not the standard for the prosecution but one for the appellant in order to prove his allegation in face of the prosecution evidence that the statement was made voluntarily. It may be questioned whether the trial judge was right as regards the burden on the appellant because in *Juraimi bin Husin*, Gopal Sri Ram JCA said at p 562 that 'the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily', but that was not what Mr Karpal Singh questioned. His submission arose out of a misconception of the words of the trial judge as meaning that to him the burden on the prosecution was one of proof on a balance of probabilities. The trial judge, as we stated just now, clearly recognized that the burden on the prosecution was one of proof beyond reasonable doubt.

Another issue raised by Mr Karpal Singh concerned the various aforementioned statements made by the appellant on 26 and 27 August 1994, which were admitted, and which the appellant's counsel had no objection to their admission, under s 27 of the Evidence Act 1950 as information leading to discovery. Mr Karpal Singh referred to *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507. In that case, the trial judge was highly suspicious as to the voluntariness of s 27 information. He said there was a great possibility that the accused had been tortured while in police custody. He entertained grave doubts that the accused would have given the information if he had not been tortured, threatened or induced (see p 524). Yet he admitted the information. The question that arose for decision in that case, which was raised by Mr Karpal Singh himself, was whether to render s 27 information admissible it must have been made voluntarily. Mr Karpal Singh contended that it must and he relied on *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350, a decision of the Federal Court. The Federal Court in *Goi Ching Ang* (by Chong Siew Fai CJ (Sabah and Sarawak) observed (pp 520–521) that prior to *Md Desa,* the Malaysian courts had consistently held that s 27 information was admissible even though it may not have been given voluntarily, and took the stand (p 524) that that position of the law should not be departed from, although they agreed with *Md Desa,* as a matter of policy, that voluntariness was desirable. They said that any change in the law was a matter for the legislature, but since in that particular case the trial judge had entertained grave doubts as to the voluntariness of the information, 'it was open to the trial court to exercise its discretion whether to let in the information as part of the trial' (p 526). The Federal Court concluded at p 527:

> In short, since the learned trial judge in the instant case under appeal had found that the s 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s 27 information obtained has an adverse effect on the

A fairness of the proceedings so that the learned trial judge ought not to have admitted it.

The Federal Court, however, just before that conclusion, that is at p 527, interpolated this statement:

B Moreover, admitting the appellant's s 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.

It was that statement, as reflected in holding (2) in the headnote, that Mr Karpal Singh relied on before us in connexion with the s 27 bits of C information in this case.

As far as self-incrimination is concerned, sub-s (iv) (now (4)) of s 112 requires a police officer examining a person under sub-s (i) (now (1)) to first inform him that he 'may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture' (proviso to sub-s (ii) (now (2)).

D

Since Mr Karpal Singh did not contend that the s 27 information in this case was not voluntary, by relying on the paragraph at p 527 of *Goi Ching Ang* he must have meant to say, on the authority of that paragraph, that even though a s 27 statement is voluntary, it is inadmissible if it was made before its maker had been given a caution against self-incrimination.

E

In view of the fact that the question that arose in *Goi Ching Ang* was one of voluntariness and not of self-incrimination, we were hesitant to accept *Goi Ching Ang* as laying down that for s 27 information to be admissible it must be given after he has been cautioned against self-incrimination. It may be that the paragraph at p 527 was thrown in merely as a fortification F for the ensuing opinion, based primarily on the trial judge's finding as to absence of voluntariness, that the information ought not to have been admitted.

We did not, however, need to arrive at an opinion on the question because in this case the question of fact whether a warning against self-G incrimination was given to the appellant at any time before he gave those bits of information never arose since, as has been shown, the admission of the information was not objected to by the appellant's counsel.

Mr Karpal Singh's main submission was as to the defence of drunkenness. Subsection (2) of s 86 of the Penal Code provides:

H Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

The appellant's defence was that he was in a state of unconsciousness at the time of the killing. This was what he said in his examination-in-chief (notes: I p 124B–C):

Semasa saya pukul Ali, sebelum saya pukul Ali, ia telah jatuh ke tanah. Saya pun pukul beliau. Selepas itu saya nampak tangan saya berdarah. Apabila

saya tengok darah itu saya pun muntah dan pening kepala. Saya terus menyandar ke kereta. Selepas itu saya tak tahu apa yang terjadi. Selepas itu apa yang saya ingat ialah apabila saya sampai balik ke rumah pada malam itu.

It was submitted at the end of the trial to the effect that the appellant's state was due to intoxication and was such that he had no intention to cause death. Therefore the appellant could only be found guilty on a reduced charge of culpable homicide not amounting to murder.

In delivering his decision at the end of the trial, the trial judge said this (notes: p 156A–C):

Di dalam kes ini tidak disangkal bahawa sebelum kejadian OKT telah meminum minuman keras seperti yang dinyatakannya dan juga seperti keterangan saksi pendakwaan SP4. Mahkamah juga tidak menolak kemungkinan OKT berada di dalam keadaan mabuk. Mahkamah boleh mengambil perhatian bahawa minuman seperti samsu, Guinness Stout dan beer boleh memabukkan.

Sehubungan dengan ini adalah amat relevan mengimbas kembali keterangan OKT sendiri di dalam pembelaannya dan keterangan-keterangan lain yang menunjukkan perbuatan dan tingkah laku OKT sebelum dan selepas kejadian.

After setting out the acts and conduct of the appellant, the trial judge concluded at p 156 of the notes:

Berdasarkan fakta-fakta di atas adalah jelas bahawa kemabukan OKT sewaktu kejadian tidak banyak menjejaskan daya pemikiran, pertimbangan dan akal OKT sehinggakan ia tidak tahu apa yang dilakukannya.

At pp 22–23 of his grounds of decision prepared for the appeal, the trial judge said this:

The substantive defence advanced by the defence, is intoxication. As a result of having consumed too much liquor before the incident the accused had no recollection of what happened. To support this, SD2 the accused's mother was called to testify that when the accused and friends stopped over at her home that night she noticed the accused was drunk. He had a can of Carlsberg beer with him. As regards to this proposition there is also evidence before this court, that of the accused's uncle (SP12), who stated in his testimony that when the accused and friends came in he noticed only the deceased was drunk while the accused and SP4 were normal.

Counsel for the defence submitted that the state of drunkness [sic] the accused was in at the time of the offence had rendered him incapable of forming the requisite intent of committing murder.

The prosecution having proved its case against the accused beyond reasonable doubt, the onus now lies with the defence to show to the court that on the balance of probabilities he has a plausible defence. On the issue of intoxication there was no scientific evidence placed before me to support the contention of the defence.

Given the factual matrix of the case, the conduct of the accused before and after the commission of the offence was not consistent with the defence's

A claim that the mental faculties of the accused were so affected to the extent that he could not have formed the requisite intention to inflict the fatal injuries found on the deceased. His claim that he heard a quarrel between SP4 and the deceased showed that he was conscious and mentally alert and was aware of what was going on.

B Then there is evidence that on the way home the accused asked SP4 to stop their car at a place where the accused alighted and threw the rotan, the deceased's trousers and parang into a swamp. At another place along the road he again requested SP4 to stop the car. This time he went some distance into the oil palm plantation and hid the deceased's head by covering it with some oil palm fronds.

C All these were done to eliminate evidence and traces of the crime that he had committed. This shows that the consciousness of his mind was not at all impaired or affected.

To understand the mention of the appellant's uncle, it is needful to state that the appellant's mother and uncle lived in the same house and that the D uncle was present when the appellant, Meganathan and the deceased went to the house on the night of the murder.

Mr Karpal Singh's submission on the issue of drunkenness was that the grounds of decision showed that the trial judge misdirected himself in rejecting the defence of drunkenness on the ground of absence of scientific evidence and that the contents of the passage that has been quoted from the E grounds of decision were inconsistent with the trial judge's finding expressed at the end of the trial that the appellant was drunk.

It was clear to us, as far as the grounds of decision were concerned, that the trial judge did bear in mind that the standard of proof on the appellant as to drunkenness was one of balance of probabilities but that, after F considering the appellant's conduct as proved by the prosecution, the trial judge did not find it probable that the state of mind of the appellant was at all impaired or affected by intoxication. In mentioning the absence of scientific evidence, the trial judge did not intend to say that the standard of proof on the appellant was such that his defence could not be accepted without the support of scientific evidence. What he meant was that looking G at the evidence available as a whole it was not probable that the appellant was unconscious or had no intention to cause the death of the deceased and that if ever what was so obvious from the evidential material that was available could be disturbed, it could be disturbed only by some scientific evidence.

H It was also clear to us that when, in delivering his judgment at the end of the trial, the trial judge said that he did not discount the probability that the appellant was drunk, he did not find that the appellant was drunk to the extent that he was unconscious or was incapable of forming the intention to cause death. After considering the conduct of the appellant, the trial judge I found that the appellant was not that drunk.

In our view, the evidence in its entirety clearly showed that the appellant killed the deceased deliberately for the purpose of obtaining a

human skull that he believed was needed in order to win a four digit lottery.

Appeal dismissed.

Reported by Lim Lee Na